Office - Supreme Court, U.S.
FILED
NOV 30 1983
29
ALEXANDER L. STEVAS,
CLERK

83-900

No.

IN THE

Supreme Court of the United States

October Term, 1983

JOHN D. JONES, a/k/a
JACK JONES

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANFORD SHMUKLER
Twelth Floor
1314 Chestnut Street
Philadelphia, Pa. 19107
Counsel for Appellant Jones

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Where there is no actual conflict of interest, is the panel's Judgment Order, affirming the District Court's disqualifying of Petitioner's counsel, inconsistent with decisions of this Court and other Circuits in denying Petitioner his constitutional choice of counsel?

2. Where Petitioner's counsel represents, in a state proceeding, a person who may be called as a witness against Petitioner in a peripherally related federal case, but does not obtain any confidential information from him, and thus there has not been shown to be any actual or potential conflict of interest, does the disqualification of counsel unconstitutionally restrict Petitioner's choice of counsel?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Federal Rule of Criminal Procedure	2
Statement of the Case	3
Reasons for Granting The Writ	7
1. In the absence of an actual conflict of interest, the panel in approving the District Courts Disqualification of counsel denies Petitioner of counsel of his choice and is inconsistent with decisions of this Court and of other Circuits	8
2. Where counsel represents, in a state proceeding, a person who may be called as a witness against Petitioner in a peripherally related federal case, but does not obtain from him any confidential information, there is no actual or potential conflict, and disqualification of counsel deprives defendant of his constitutional choice of counsel	11
Conclusion	16
Appendix A: Court of Appeals Judgment Order	A1
Appendix B: District Court Order Of December 22, 1982, Disqualifying Counsel	A3
Appendix C: Memorandum Opinion J. Huyett, Dated 3/31/83	A4
Appendix D: Excerpts From Disqualification Hearing	A12

TABLE OF AUTHORITIES

Cases: Page

Cuyler v. Sullivan, 446 U.S. 335 (1980) (Cuyler II) . 9, 10, 11

Dukes v. Warden, 406 U.S. 250 (1972) 10

Holloway v. Arkansas, 435 U.S. 475 (1978) 9

Smith v. Bordenkircher, 671 F.2d 936 (6th Cir. 1982) . . 10

United States ex rel. Sullivan v. Cuyler, 593 F.2d 512 (3rd Cir. 1979) (Cuyler I) 9, 10

United States v. Agosto, 675 F.2d 965 (8th Cir. 1982) . 10, 14

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) 10, 12

United States v. Cunningham, 672 F.2d 1064 (2nd Cir. 1982) 10

United States v. Curcio, 680 F.2d 881 (2nd Cir. 1982) . 10

United States v. Dolan, 570 F.2d 1177 (3rd Cir. 1978) 12, 13

United States v. F.M.C. Corp., 495 F.Supp 172 (E.D. Pa. 1980) 14

United States v. Flanagan, 679 F.2d 1073, cert. granted, 32 Cr.L. 4245 (January 10, 1983) 7, 8, 12

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) . 10, 12

United States v. Provenzano, 620 F.2d 985 (3rd Cir. 1980) 13

United States v. Quinones, 613 F.2d 47 (3rd Cir. 1980) 14

United States v. Shepard, 675 F.2d 922 (8th Cir. 1982) . 14

CONSTITUTIONAL PROVISIONS

Fifth Amendment 2

Sixth Amendment 2

TABLE OF AUTHORITIES — *(Continued)*

Cases: Page

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 44(c) 2, 7, 9, 10

MISCELLANEOUS

28 U.S.C. §1254(1) 2

Margolin and Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 *Amer. Crim. L.Rev.* 227 (1982) 14

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN D. JONES, a/k/a JACK JONES
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John D. Jones, a/k/a Jack Jones, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on September 30, 1983.

OPINIONS BELOW

On September 30, 1983 the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A1-A2, affirming the Order entered by Honorable Daniel H. Huyett, III, Judge of the United States District Court for the Eastern District of Pennsylvania, on December 22, 1982. That Order is reproduced in Appendix B, *infra*, page A3. On March 30, 1983 Judge Huyett filed a Memorandum Opinion in Support of his Order, which has not been officially reported, but which is reproduced in Appendix C, *infra*, pages A4-A11.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pages A1-A2) affirming the Order of the District Court, was entered on September 30, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The United States Constitution provides in pertinent part:

Amendment V:

> No person shall * * * * be deprived of life, liberty, or property, without due process of law . . . .

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right * * * * to have the assistance of counsel for his defense . . . .

The Federal Rules of Criminal Procedure provide in pertinent part:

Rule 44(c):

> Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained . . . counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation, Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

This Petition seeks review of a Judgment Order of the Court of Appeals affirming the Order of the District Court disqualifying counsel from representing Defendant in a criminal proceeding because counsel had previously represented, in a State criminal proceeding, an employee of Defendant whom the Government expected to call as a key witness in the federal case.

On September 28, 1982 Henry Krotzer, an employee of John D. Jones, was arrested by Pennsylvania State Police on three charges involving theft or receipt of stolen motor vehicles. Jones brought Krotzer to the Allentown law office of Wallace C. Worth, Esquire, who had represented Jones in other matters. At that time Jones had not been arrested on any of the charges pending against Krotzer but was named as co-conspirator on one of the charges against Krotzer. The entire discussion between Krotzer and Worth took place in the presence of Jones; in fact, Jones answered most of the questions (A22). Thereafter, on October 6, 1982, a preliminary hearing was held on two of the charges against Krotzer, including the one in which Jones was named as a co-conspirator. He was held for court, and the third charge was rescheduled for a later date at the request of the Commonwealth. Krotzer later waived a preliminary hearing on that charge.

On November 9, 1983, Jones was indicted on the present federal charges. The eight count indictment charged Jones with two counts of sale of goods stolen from interstate commerce, three counts of receipt of motor vehicles stolen from interstate commerce, and three counts of mail fraud (one of the mail fraud counts included a co-defendant named William Conner). Two of the three counts of receipt of motor vehicles charged the receipt of a tractor which was contained in one of the three State charges against Krotzer. On November 24, 1982 the Government filed a motion to disqualify counsel, alleging that "Worth may be forced to reveal the confidential communications of another client in his representation of defendant Jones", and that "Worth's representation of defendant Jones has the impermissible appearance of impropriety". The Government requested a hearing on its

motion. Worth filed a Reply denying these allegations and setting forth an affidavit relating to his representations of Jones and Krotzer. On December 22, 1982, a hearing was held before the Honorable Daniel H. Huyett, III, at which the Government called Henry Krotzer, as well as the State Trooper who had sworn to the Complaints against Krotzer. Defendant Jones and F.B.I. Special Agent David Kolde of the Allentown F.B.I. office were called on behalf of the defense. Relevant portions of this hearing are reproduced in Appendix D, *infra*, pages A.

At the hearing on Motion to Disqualify Counsel, Krotzer testified that he had known John Jones for 20 years, and that he had been employed by him for the past four years. In June, 1982 State authorities had impounded his truck. Jones had obtained the services of Wallace C. Worth, Esquire to get the truck back for him. This involved Krotzer going to Worth's law office to sign papers, but he did not see Worth at that time. On September 28, 1983 Krotzer was arrested for receiving stolen goods and driving a vehicle without the owner's consent. He told his wife to call Jones and tell him to get hold of Worth. When he arrived at the Police Station a telephone call was waiting for him, and Worth was on the other end of the line. He was released on his own recognizance. He then went to Jones' garage, and that afternoon or the next day they went to see Worth. Present at the meeting along with Krotzer were Jones, Worth, and Worth's associate, Diane Dixon, Esquire. Worth asked if he knew anything about the charges. Krotzer answered that the only thing he knew about was the Lincoln and he "couldn't really say the truth on that," because he got a "dirty look" from Jones when he mentioned that. (Jones had previously told him not to tell anyone about that matter.) He said that Jones responded more to Worth's questions than he did, and Krotzer would agree with Jones, even though Jones was not answering the truth, and even though he considered Worth to be his lawyer. (A16-A23.)

He next saw Worth at the District Justice hearing on October 6, when Worth represented him. He again saw Worth on November 19, 1982 at another preliminary hearing, when Krotzer told Worth that he had obtained another lawyer. He felt that Jones was lying to "put something on him," because he

overheard a telephone call between Jones and someone else, so he was afraid Worth would defend Jones rather than him. (A23-A25.)

He admitted that he never had any confidential discussions with Worth concerning any criminal conduct, before or after his arrest and his preliminary hearing. He also never spoke to Worth with regards to preparing the case. Prior to the scheduled preliminary hearing on November 19, 1982 he never called Worth to tell him he was getting other counsel. At the hearing Krotzer met with Worth, Dixon, Attorney Donald Wieand and Attorney Frederick Charles from the Public Defender's office, to discuss representation. (A27-A32.)

Jones testified that a search warrant had been served on his premises in May 1981 at which time he had contacted Worth. At the time Krotzer was arrested in September 1982, Jones was not under arrest. Jones was indicted by a Federal Grand Jury on November 9, 1982 (A34-A35). Krotzer never discussed with Worth criminal conduct in the presence of Jones. Jones paid Worth to represent Krotzer because he (Jones) had an interest in the trucks which were impounded. F.B.I. Special Agent David Kolde confirmed that he had attended the preliminary hearing for Krotzer in Allentown, and at that time Jones was not under arrest. (A37-A38.)

Following argument, the Court ruled that Mr. Worth had represented two persons at one time in criminal matters which were related, even though only one person was a defendant and the other was an unindicted co-conspirator; that Worth permitted Jones to pay him a fee to represent his employee Krotzer; the Court thereupon granted the Government's motion to disqualify Worth. On the same day the Court entered a written Order to that effect (Appendix B, *infra*, page A2), and on April 4, 1983 filed an Opinion, dated March 31, 1982, setting forth the reasons for that ruling (Appendix C, *infra*, pages A4-A11). On December 28, 1982 a timely appeal from the Order of December 22[1] was filed, and on September 30, 1983, the Court

1. On May 18, 1981 a federal search warrant had been issued for premises in Slatington, Pennsylvania belonging to Jones Truck Sales, and on May 19 and

of Appeals entered its Judgment Order affirming the District Judge's Order of disqualification (Appendix A, *infra*, pages A1-A2).

NOTE — *(Continued)*

May 20, 1981 a search was conducted by the F.B.I. On October 18, 1982 Wallace C. Worth, Esquire filed a motion on behalf of John D. Jones for return of property seized during that search. This was docketed as #81-0421-M, and later renumbered #83-00053. The District Court denied relief and an appeal was filed in the Circuit Court (#83-1123). On March 15, 1983 the Government filed motions in the District Court to consolidate the two proceedings, the indictment of Jones #82-00366, with the proceedings for return of property, #83-00053, and on the same day filed motions in the Court of Appeals to consolidate the two appeals, #83-1007, involving this appeal from the Order disqualifying Worth, and #83-1107, the appeal from the Order denying the motion for return of property. The Court of Appeals granted the Government's motion permitting the Government to file one brief and listing the case for disposition by one panel. On September 30, 1983, a Judgment Order was entered by the same panel affirming the District Court's Order denying the return of property. No petition for Writ of Certiorari is being filed in connection with that proceeding.

REASONS FOR GRANTING THE WRIT

This Court has recently granted Certiorari and has scheduled argument for November 30, 1983 in the case of *United States v. Flanagan*, 679 F.2d 1073 (3rd Cir. 1982), *cert. granted*, 32 Cr.L. 4245 (January 10, 1983), which raises the question of whether Rule 44(c) of the Federal Rules of Criminal Procedure permits a federal court to undercut defendant's constitutionally protected choice of retained counsel, denying two co-defendants the right jointly to utilize counsel of their choice to present a common defense, despite a valid waiver of potential conflicts of interest. The case at bar presents an even more egregious limitation on a defendant's right to select his own counsel—here it is *not* a joint trial, and although counsel selected by defendant had previously made a perfunctory appearance in a state proceeding for a person who might be called as a witness against defendant in this peripherally related federal proceeding, that potential witness never disclosed any confidential information to defendant's counsel.

The District Court here nonetheless concluded that this case was governed by the Third Circuit's decision in *Flanagan*, because a conflict of interest is *likely* to arise, either at the trial or before trial during plea bargaining. If this Court concludes that the reasoning of the Third Circuit in Flanagan unduly restricts a defendant's constitutional right to select his own counsel, then such conclusion will apply *a fortiori* in the case at bar. However, even if this Court concludes that joint representation of co-defendants may lead to potential conflict which warrants the Court in disqualifying counsel from representing co-defendants, as in *Flanagan*, it should still not permit an extension of that restriction to successive representation of defendants in cases in different jurisdictions which are only peripherally related, where there has been no confidential disclosure.

1. IN THE ABSENCE OF AN ACTUAL CONFLICT OF INTEREST, THE PANEL IN APPROVING THE DISTRICT COURT'S DISQUALIFICATION OF COUNSEL DENIES PETITIONER OF COUNSEL OF HIS CHOICE AND IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

In his Memorandum Opinion, Judge Huyett reasoned that although a conversation between a client and an attorney is not privileged when there is a non-essential third party present, both Jones and Krotzer were accused of a joint criminal undertaking, and therefore meeting with the attorney representing both did not destroy the confidentiality of the meeting (A7-A8). Furthermore, the Court continued, Krotzer's acquiescence in Jones' answers to Worth's questions constituted confidential communications to Worth by Krotzer (A9). This led Judge Huyett to conclude that an actual conflict of interest was likely to materialize, and that under *Flanagan*, disqualification of defense counsel is an appropriate measure (A9-A11).

It should be noted that in its motion to disqualify counsel, the Government urged that Worth's representation of Jones may constitute a conflict of interest in violation of ethical canons because Worth may be forced to reveal the confidential communications of another client in his representation of Defendant Jones and that his representation of Jones has the impermissible appearance of impropriety. The Government did *not* allege that there was an *actual* conflict or that a conflict was very likely to arise. At the disqualification hearing, the Government argued that at Krotzer's preliminary hearing Worth was protecting the interests of Jones. Although this could conceivably lead to a charge by Krotzer that Worth was not effective in his representation of Krotzer, it can not give rise to any complaint by Jones. The question presented by the motion, as well as by the pertinent cases discussed hereinafter, is whether Worth learned confidential information from Krotzer which would prevent him from cross-examining Krotzer if he ever became a witness against Jones, or whether any conflict will prevent Worth from protecting the best interests of Jones, or that Jones can argue

that he did not have effective assistance of counsel. It is respectfully submitted that no such confidential information was discussed and no such conflict or potential conflict is shown on this record.

Even in the area of multiple representation, this Court has rejected potential conflict as grounds for disqualification of counsel. Such potential conflict of interest was the predicate for the Third Circuit's decision in *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512 (3rd Cir. 1979) (hereinafter "Cuyler I"). Two privately retained attorneys had represented both petitioner and two co-defendants in connection with state court murder trials. Sullivan raised no objection to such representation, based, in part, on his inability to afford his own counsel. Sullivan was tried and convicted, after resting without presenting a defense. His co-defendants were later acquitted at separate trials. After exhausting his state remedies, Sullivan filed a petition for Habeas Corpus arguing, *inter alia*, that counsel had a conflict of interest based upon their representation of his two co-defendants. The Third Circuit reversed the denial of the petition, finding that the mere possibility of conflict of interest resulting from multiple representation was sufficient to deprive a defendant of his right to effective assistance of counsel, concluding:

> "Numerous recent cases in this Circuit have repeated this standard and made clear that actual prejudice or conflict of interest need not be shown. The mere possibility, however remote, is sufficient." *Cuyler I*, *supra*, 593 F.2d, at 519-520.

On appeal, this Court specifically and unequivocally held that the standard enunciated by the Third Circuit in *Cuyler I* was erroneous. The Court held both that the Rule 44(c) inquiry is not constitutionally mandated and that multiple representation does not violate the Sixth Amendment absent an *actual* conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (hereinafter "Cuyler II"). *Accord: Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). *Cuyler II* held that a possibility of conflict from multiple representation is insufficient to warrant a conclu-

sion that a lawyer's performance was adversely affected and/or ineffective:

> "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler II*, *supra*, 446 U.S. at 350. *Accord: Dukes v. Warden*, 406 U.S. 250 (1972).

Both *Cuyler II* and *Holloway* make clear that only an actual conflict of interest may permit reversal of a conviction on Sixth Amendment grounds, and that since the Rule 44(c) inquiry is not even constitutionally mandated, no court may deny a criminal defendant chosen counsel to present a common defense unless there is an actual conflict. Other circuits have come to similar conclusions. See *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2nd Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Also see *United States v. Curcio*, 680 F.2d 881 (2nd Cir. 1982); *United States v. Cunningham*, 672 F.2d 1064 (2nd Cir. 1982); *Smith v. Bordenkirche.*, 671 F.2d 936 (6th Cir. 1982) and *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982).

This Court has granted Certiorari to review the Third Circuit's conclusion in *Flanagan* that the potential conflict resulting from joint representation of co-defendants is grounds for disqualifying counsel, even though there may be a knowing and intelligent waiver of such potential conflict of interest by the co-defendants. If this Court rejects the Third Circuit's reasoning in *Flanagan*, then it should even more emphatically reject its reasoning in the case at bar, in which the potential conflict is even less apparent.

2. WHERE COUNSEL REPRESENTS, IN A STATE PROCEEDING, A PERSON WHO MAY BE CALLED AS A WITNESS AGAINST PETITIONER IN A PERIPHERALLY RELATED FEDERAL CASE, BUT DOES NOT OBTAIN FROM HIM ANY CONFIDENTIAL INFORMATION, THERE IS NO ACTUAL OR POTENTIAL CONFLICT, AND DISQUALIFICATION OF COUNSEL DEPRIVES DEFENDANT OF HIS CONSTITUTIONAL CHOICE OF COUNSEL.

The District Court's reliance on *Flanagan*, approved by the Third Circut panel's Judgment Order, appears to be misplaced. *Flanagan* involved a question of simultaneous representation of co-defendants. In that case, four Philadelphia police officers were charged with conspiracy to violate civil rights of citizens and substantive violations. The defendants chose to present a common defense, and all retained one law firm to represent them. Pursuant to Government request, the District Court conducted a hearing to determine whether defendants were aware of the risks of joint representation and their right to separate representation. The District Court found that each defendant was completely aware of the potential conflicts of joint representation and that each defendant had voluntarily and intelligently chosen to waive any claim of conflict of interest in electing to be represented by one counsel. But because the District Court also found that a conflict of interest "was very likely to arise in the course of proceedings," it held that the waivers need not be accepted and ordered that the firm should be disqualified from representing any of the defendants. Judge Gibbons, speaking for a three Judge panel of the Third Circuit affirmed this action, recognizing that the Supreme Court had acknowledged that waiver of potential conflicts is possible, in *Cuyler II*, *supra*, 446 U.S. 335 (1980).[2] The Third Circuit cited its earlier decision in *United*

2. It should be noted that in the case at bar the trial Judge refused to permit counsel to question Defendant Jones about his willingness to waive any conflict, and to explore whether such waiver was knowing and intelligent (A36-A37).

States v. Dolan, 570 F.2d 1177 (3rd Cir. 1978), which held that a trial court need not accede to a waiver of conflict of interest when faced with an actual serious conflict of interest on the part of an attorney representing two co-defendants. In *Flanagan* the Third Circuit noted that *Dolan* does not require the trial court to accede to a waiver when the conflict is anything short of actual. The panel noted that the trial court had found, and *the defendants did not dispute*, that a conflict of interest is very likely to arise. The trial court had expressed its concern that the likely conflicts might well develop into actual conflicts before the trial came to a close. Accordingly, the panel in *Flanagan* affirmed the disqualification, concluding there was no abuse of discretion.

It should be noted that other circuits have come to contrary conclusions. See, *e.g.*, *United States v. Armedo-Sarmiento*, 524 F.2d 491 (2d Cir. 1975), and *United States v. Garcia*, 17 F.2d 272 (5th Cir. 1975), where the Second and Fifth Circuits held that defendants have a constitutional right to a knowing and intelligent waiver of any disqualification of defense attorneys. Both cases involved representation of former clients in substantially-related criminal proceedings. Furthermore, this Court has granted Certiorari to review the Third Circuit's ruling in *Flanagan*.

Not only did *Flanagan* involve a question of simultaneous representation of co-defendants, but *Dolan* also involved simultaneous representation of co-defendants in the same federal case. In that case one attorney represented a defendant who pled guilty before trial, and who was awaiting sentence at the time of the trial of his co-defendant, who was represented by the same attorney. At his trial, defendant took the stand and testified that he was only assisting the guilty-pleading co-defendant. The government then announced its intention to call the pleading defendant as a rebuttal witness. There was no question in that case that counsel had obtained confidential communications from both clients, and that he would be forced into a position of cross-examining one of his own clients in order to protect the interest of his other client. The trial court again questioned both defendants as to their desire to waive and even though they persisted, granted a motion for mistrial and ordered the attorney to withdraw from representing one or the other. Defendant, still

desiring to have the attorney represent him, took an appeal. Thus, the sole question before the court was whether the clients could effectively waive this clear and obvious *actual* conflict. Judge Rosenn, speaking for a three Judge panel, concluded:

> "[W]hen a trial court finds an *actual conflict of interest* which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant." 570 F.2d, at 1184 (emphasis added).

However, in cases involving *successive* representation of defendant, rather than simultaneous representation, a different standard has been applied in the Third Circuit. In *United States v. Provenzano*, 620 F.2d 985 (3rd Cir. 1980), an attorney was disqualified from representing one of the defendants charged with RICO and conspiracy because he had previously represented the Government's key witness in the case on a State murder conviction charge. The District Court held that he would be in a conflict of interest situation between the duty of vigorous representation of his client and the duty of loyalty to the witness, since confidences relating to the witness' murder conviction and events of that period would be useful to impeach him as a witness against the defendant. Although the defendant stated he was willing to waive effective representation as the price for retaining his attorney, the Court concluded that there is no absolute right to particular counsel when there is an actual conflict of interest, citing *Dolan*. Judge Garth, speaking for a three Judge panel of the Third Circuit, noted that although the District Judge did not make explicit findings that the attorney knew specific facts that would have involved him in conflict, the District Court "correctly concluded that he must assume as much, since he could not actually inquire about that matter without thereby himself destroying the confidence." 620 F.2d, at 1005. The Court concluded that the attorney's access to privileged information is "conclusively presumed." However, in the case at bar, Worth's access to privileged information has been *conclusively refuted* by Krotzer and Jones.

In *United States v. Agosto*, 675 F.2d 965, 972 (8th Cir. 1982), the Eighth Circuit held that the "irrefutable presumption" doctrine should not be invoked as to a knowledgeable client who maintains that, in fact, no confidential communications were made. In that case the District Court had disqualified an attorney from representing one defendant because he had previously represented grand jury witnesses, even though the grand jury witnesses had submitted affidavits stating that they did not consider their communications to be confidential. That Circuit's reasoning is, *a fortiori*, applicable to the facts of the instant case, where the witness Krotzer has acknowledged under oath at a judicial hearing that he made no confidential disclosures to attorney Worth, and that any disclosures made by Defendant Jones in his presence were not the truth. Also see *United States v. Laura*, 667 F.2d 365 (3rd Cir. 1981). Furthermore, the *Agosto* case discussed the potentiality of conflict which could arise from the attorney's continuing pecuniary interest in a former client. 675 F.2d, at 976-77. No such continuing pecuniary interest has been shown in the case at bar — in fact, it has been conclusively refuted, since it was Jones who had paid Worth for representing Krotzer in the State proceeding. Also see *United States v. Shepard*, 675 F.2d 922 (8th Cir. 1982); *United States v. F.M.C. Corp.*, 495 F.Supp. 172, 173 (E.D. Pa. 1980).

The practice of the Government moving to disqualify attorneys for mere advice to individuals who later may be designated as witnesses has been discussed and criticized in Margolin and Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 *Amer.Crim.L.Rev.* 227 (1982).

In cases where the court has found a potential conflict even as to simultaneous representation of co-defendants, the remedy has not been complete disqualification, but merely requiring counsel to represent one or the other defendant. For example, in *United States v. Quinones*, 613 F.2d 47 (3rd Cir. 1980), two defendants, charged along with ten other defendants in a twelve count drug conspiracy indictment, sought to be jointly represented by one attorney. The Government filed a motion for pretrial hearing, following which the District Judge ruled that a potential conflict of interest existed and that he could not properly

find a knowing and intelligent waiver of both defendants' constitutional right to effective representation. A three Judge panel of the Third Circuit, *Per Curiam*, affirmed the order of the District Court requiring the attorney to withdraw from representation of *either of the defendants*. Thus, the Court appeared not to be concerned with the question of whether counsel had obtained confidential communications or whether access to privileged information could be presumed, or even whether there was likely to be actual conflict, in allowing him to continue as counsel for one of the defendants. If this is true as to simultaneous representation, then it is even more true as to successive representation of different individuals, especially on the record in this case.

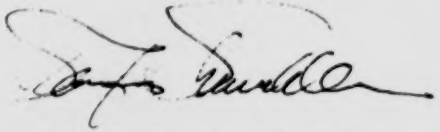
In the case at bar, the record shows clearly that there is no *actual* conflict. Whether or not the statements made by Jones in the presence of Krotzer, and Krotzer's "assent" thereto, can be considered to be confidential communications, as concluded by the trial Judge (A9), Krotzer testified that there were no disclosures made by Krotzer which could be utilized by Worth to help Worth cross-examine Krotzer if Krotzer is actually called as a witness at the trial of Jones; therefore, this is distinguishable from the situation in *Dolan*. Nor is there any concession by the Defendant that a conflict is very likely to arise, as was true in *Flanagan*. Nor was there any continuing pecuniary interest by Worth in Krotzer which would hamper or impede his effective representation of Jones, as discussed in *Agosto* and *Shepard*. The trial Judge also refused to permit counsel to explore the question of knowing and intelligent waiver of any conflict by Defendant Jones.

For all these reasons, the trial Judge in ordering Worth disqualified as attorney for Jones, has deprived petitioner Jones of his constitutionally guaranteed right to choose his own counsel in mistaken reliance upon and extension of an inapplicable and no longer viable standard enunciated in *Flanagan*. The Judgment Order affirming this remedy thus violates the decisions of this Court and conflicts with the decisions in other Circuits, and violates Petitioner's constitutional rights.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted:



STANFORD SHMUKLER
Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1007

UNITED STATES OF AMERCIA

v.

JONES, JOHN D. a/k/a Jack Jones

John D. Jones,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 82-00366-01)
District Judge: Honorable Daniel H. Huyett, 3rd

Submitted Under Third Circuit Rule 12(6)
September 29, 1983
Before: ALDISERT and BECKER *Circuit Judges*,
and COHILL, *District Judge*.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: the district court erred in disqualifying counsel for defendant where counsel had previously represented in state proceedings a potential witness against defendant but had not obtained confidential communications from him; it is

---

* Honorable Maurice B. Cohill, Jr., of the United States District Court for the Western District of Pennsylvania, sitting by designation.

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ALDISERT

Circuit Judge

Attest:

/s/ SALLY MRVOS

Sally Mrvos, Clerk

Dated: September 30, 1983

APPENDIX B

LNS:lcm

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No.
	:	82-00366
	:	
JOHN D. JONES, a/k/a Jack Jones	:	

ORDER

AND NOW, this 22nd day of December, 1982, upon consideration of the Government's Motion to Disqualify Counsel and Supporting Memorandum, and the hearing held thereon, it is hereby

ORDERED

that Wallace C. Worth, Jr., Esquire is disqualified from representing or participating in any way in the representation of John D. Jones in connection with the above-captioned criminal case. A statement of reasons shall be filed shortly

BY THE COURT:

/s/ DANIEL H. HUYETT, III

J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	ACTION
JOHN D. JONES,	:	No. 82-366
a/k/a Jack Jones	:	

MEMORANDUM

HUYETT, *J.* March 31, 1983

In this criminal matter, defendant John D. Jones a/k/a Jack Jones has been charged with violations of 18 U.S.C. §§ 2315 and 2313. The government alleges that the defendant has received motor vehicles stolen from interstate commerce and that he has sold goods stolen from interstate commerce. Jones is also charged with mail fraud in violation of 18 U.S.C. § 1314.

The defendant retained the firm of Wallace C. Worth, Jr. to represent him. Before me is the government's motion to disqualify Worth from representing or participating in the representation of the defendant because Worth previously represented a key government witness, Henry Krotzer. I held a hearing and issued my order and decree granting the government's motion. This memorandum constitutes my findings of fact conclusions of law, and statement of my reasons for ruling as I did.

Henry Krotzer testified at the hearing. I found him to be a credible witness. He was candid and answered the questions of counsel in an open and forthright manner.

Henry Krotzer and John Jones had known each other for a period of twenty years. Jones operated Jones' Truck Sales, where he employed Krotzer from approximately 1978 until 1982. Jones bought and sold used tractor trailer and truck parts. Krotzers' employment related to this operation. Krotzer left Jones' employ after the events described below.

On September 28, 1982, Krotzer was arrested on state charges, which included receiving stolen property, unauthorized use of a motor vehicle, conspiracy and falsification of an identification number. Jones was named in the state charges as a co-conspirator. Following his arrest, Krotzer voluntarily agreed to provide information to the FBI concerning Jones. Jones was indicted by a federal grand jury on the present federal charges on November 9, 1982. One vehicle, an International Harvester tractor, identification number D4227HHA10108, forms the basis for one of the three state charges against Krotzer and counts 3 and 4 of the federal indictment against Jones.

Worth's representation of Krotzer preceded Krotzer's arrest in September. In June, 1982, pursuant to a state search warrant, Krotzer's trucks were searched and impounded by Pennsylvania State Police. Krotzer discussed the matter with Jones, his employer. Jones told Krotzer that if the Pennsylvania State Police were to arrest him as a result of the search, he should call Worth and Jones immediately. This was the second time that Jones arranged to have Worth represent Krotzer in matters relating to Krotzer's business activities with Jones.

The first time that Worth was hired by Jones to represent Krotzer involved the repossession of a truck which Jones told Krotzer he would attempt to get returned to him. To effect this return, Jones told Krotzer he had retained Wallace Worth, who had represented Jones on several prior occasions over a two-year period. As he was instructed by Jones, Krotzer went to Worth's office to sign papers in blank in connection with Worth's efforts to have the truck returned. He did not speak to Worth on that occasion.

Upon his arrest on September 28, 1982, Krotzer asked his wife to call Jones and have Jones contact Worth, as was prearranged. When Krotzer arrived at the police station, he received a call from Worth, who advised him to remain silent. Krotzer was released on his own recognizance.

After his release, Krotzer went to discuss the matter with Jones. According to Krotzer, Jones instructed him not to tell anyone what he knew about the allegations contained in the state complaint, or of Jones alleged involvement in the events

stated in the charges. Following their conversation, Jones took Krotzer to the office of Worth.

Present at the meeting were Wallace Worth, Diane Dixon, Esquire, Worth's associate, Krotzer and Jones. Worth asked Krotzer whether he knew anything about the charges against him. Krotzer responded that he knew about the Lincoln automobile mentioned in one of the complaints. According to Krotzer, as he began to explain, he was interrupted by a "dirty look" from Jones, which reminded him of Jones' alleged prior warning not to admit knowledge of the events to anyone. Worth continued to question Jones and Krotzer about various cars, trucks and parts mentioned in the complaint. Jones answered Worth's questions regarding the items, explaining how he and Krotzer acquired them, and Krotzer agreed with Jones' explanations. Although he now states that he believed Jones was not being truthful in his responses, Krotzer states that he did not object because of Jones' warning not to reveal to anyone his knowledge of the alleged events.

As the meeting ended, Worth agreed to represent Krotzer at the preliminary hearing on the charge. Jones agreed to pay Worth for all of Krotzer's legal expenses. Jones and Jones' wife accompanied Krotzer to the first hearing, on two of the three state charges, held on October 6, 1982 before Magistrate James Stahl. Worth was also present. Krotzer believed Worth was acting as his attorney and would represent his interest. At the hearing testimony was given by several witnesses. Some of the witnesses' testimony incriminated Jones, as well as Krotzer, in the alleged activities. Throughout the hearing Worth acted as if he were representing the interests of both Jones and Krotzer. He vigorously cross-examined the witnesses about Jones. Although Jones was not a defendant at the hearing, Worth objected when some testimony was elicited regarding Jones.

Prior to the second preliminary hearing, which was held on November 19, 1982, Krotzer went to the Lehigh County Public Defenders' office to seek another attorney because he felt he could not trust either Jones or Worth. Krotzer stated that he had overheard a telephone conversation by Jones regarding truck parts in which Jones told the caller he had acquired the parts

from Henry Krotzer. Krotzer believed Jones was trying to place the blame for a stolen motor on him, by saying he purchased it from Krotzer, when this was not in fact true. Additionally, Krotzer stated that he had become uneasy because of the statements that Jones made to Worth at the meeting on September 29, 1982 about Krotzer's involvement in the activities underlying the state charges. Krotzer stated that he believed that Worth could not defend both of them. Krotzer feared that because Jones was paying Worth, and Worth had representd Jones in other matters, Worth could represent Jones more diligently than he would represent Krotzer.

Worth attempted to contact Krotzer to prepare for the second preliminary hearing on November 19, 1982, however, he did not speak to Krotzer prior to that hearing. Kortzer arrived at the hearing with two attorneys from the Public Defenders' office. At the hearing, Krotzer told Worth that he no longer wanted Worth to represent him.

On November 9, 1982, the federal grand jury returned the present indictment against John Jones.

The government contends that the continued representation of Jones by Worth would be improper because of an actual or apparent conflict of interest. It asserts that Worth may be forced to reveal a confidential communication by Krotzer in his representation of Jones because Worth represented Krotzer in a criminal matter closely related to the federal charges now pending against Jones. The government further asserts that Worth's former relationship with Krotzer will make it impossible for him to represent Jones with the independence of judgment required by the sixth amendment.

The defendant argues that no conflict of interest is present because no confidential communication took place ever between Worth and Krotzer. The defendant also contends that Jones' presence in Worth's office during the meeting between Krotzer and Worth precludes such a finding.

Conversations between a client and his attorney are not privileged where there is a non-essential third-party present. *Johnson v. United States*, 542 F.2d 941, 942 (5th Cir.), *cert. denied*, 430-U.S. 934 (1976); C. McCormick, Evidence §91, at 188

(2d ed. 1972). It does not follow from this rule of law, however, that the presence of a third-party necessarily vitiates the attorney-client privilege. For example, the presence of employees of the attorney does not destroy the confidentiality of the conversation. *See United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). Similarly, when two persons accused of a joint criminal undertaking meet with an attorney representing both, the presence of one client should not affect the other client's right to confidentiality. Accordingly, individuals who are alleged to have been involved together in criminal activity must be able to seek legal advice and speak freely with counsel without fear that their disclosures will be used against them in subsequent proceedings.

Jones' presence at the meeting with Krotzer and Worth on September 29, 1982 does not destroy the confidential nature of the meeting and the information disclosed to Worth. Krotzer and Jones each believed that the other was an essential party to this meeting because the subject of the meeting related to their joint activity. Jones and Krotzer had known each other for many years. Krotzer worked for Jones at Jones' Truck Sales for several years prior to his arrest. The allegations in the state complaint related to Krotzer's and Jones' business activities. Although he had not been arrested on state charges at that time, Jones was named as a co-conspirator in the state charges filed against Krotzer. It is apparent that Jones and Krotzer believed themselves to be implicated together in the events. The present federal indictment of Jones refers to one of the same vehicles which formed the basis of the state charges against Krotzer. Additionally, Jones stated that he had an interest in two of the trucks impounded as a result of Krotzer's arrest. The circumstances of the first preliminary hearing also demonstrate that all parties believed that Jones and Krotzer were implicated together, and were presenting one defense. Jones accompanied Krotzer to the state preliminary hearing, at which Worth acted as if both Krotzer and Jones were his clients. By his cross-examination of the witnesses he not only protected Krotzer's interests, but Worth also challenged testimony which appeared to implicate Jones.

Additionally, Jones and Krotzer each understood that Worth was representing both of them. Krotzer knew Worth was Jones' attorney. Jones had arranged for Worth to represent Krotzer. Jones advised Krotzer what to do if he was arrested and how to handle his defense. Krotzer believed that Worth was his attorney and would protect his interests. He also expected that the disclosures made would not be revealed to anyone not present at the meeting. I conclude that a confidential relationship existed between Worth and Krotzer.

The defendant also contends that Krotzer disclosed no confidential information to Worth. Upon Worth's initial questions to Krotzer at the meeting on September 29, 1982, Krotzer told Worth that he had knowledge of the allegations contained in the complaint regarding one of the automobiles, a white Lincoln. Following this statement, Krotzer permitted Jones to respond to Worth's questions and communicated to Worth his assent to Jones' responses. This conduct by Krotzer constitutes confidential communications to Worth.

In *United States v. Flanagan*, 679 F.2d 1072 (3d Cir. 1982), *cert. granted*, January 10, 1983, our court of appeals held that where an actual conflict of interest is very likely to materialize, disqualification of defense counsel is an appropriate measure. *Id.* at 1076. While *Flanagan* involved the joint representation of co-defendants by one firm, I believe that the facts of this case are analogous to those in *Flanagan*. In this case Worth has, in effect, represented two persons allegedly involved in a joint undertaking which has resulted in criminal charges. Even though Jones had not been formally charged by the state, he was named as a co-conspirator throughout the state charges against Krotzer. Those state charges are very closely related to the federal charges now pending against Jones.

I am gravely concerned that a conflict of interest is very likely to arise in this case, either at trial or before trial during plea bargaining, because of Worth's representation of Krotzer. Because a conflict is very likely to materialize during these proceedings, Worth must be disqualified as Jones' attorney. The fact that Krotzer subsequently retained other counsel does not preclude Worth's disqualification. A serious potential for conflict

is still present. *See United States v. Garafola*, 428 F. Supp. 620, 622-23 (D.N.J. 1977), *aff'd sub nom. United States v. Dolan*, 570 F. 2d 1177 (3d Cir. 1978). The government has stated that it intends to call Krotzer as a government witness at trial. Because of his employment by Jones, his alleged involvement in the events and his knowledge of the items contained in the charges, Krotzer will be an important government witness in its trial against Jones. It appears to me that Worth cannot effectively cross-examine Krotzer in light of their prior confidential relationship. Mr. Worth cannot ask Krotzer questions on cross-examination regarding any of the confidential disclosures he made during Krotzer's meeting with Jones and Worth on September 28, 1982 without touching upon matters protected by the attorney-client privilege. As his testimony at the hearing demonstrated, Krotzer is likely to testify to facts different from those related to Worth by Krotzer and Jones at the meeting on September 28, 1982. While Krotzer now states that he believed the information provided by Jones at the meeting to be false, he did not tell Worth this. Krotzer now explains that his failure to disagree with Jones was based upon alleged prior warnings from Jones and a threatening look by Jones at the meeting. Worth would be faced with a former client testifying to facts inconsistent with those disclosed to him in a confidential communication. Worth would be tempted to use the prior inconsistent statements made by Krotzer when he assented to Jones statements at the meeting to impeach Krotzer, in an effort to zealously defend Jones. It is also possible that Worth, aware of his obligation to his former client, would overcompensate and be less than zealous in his cross-examination of Krotzer thereby denying Jones his sixth amendment right to effective assistance of counsel. *See, United States v. Garafola*, 428 F. Supp. 620 (D.N.J. 1977), *aff'd sub nom. United States v. Dolan*, 570 F. 2d 1177 (3rd Cir. 1978).

Despite Jones' present desire to have Worth represent him at this criminal trial, Jones, if convicted, may later become dissatisfied with Worth's representation and move for a new trial, alleging he was denied effective assistance of counsel. If Worth were permitted to continue as Jones' counsel, any plea agree-

ment reached with the government might also be vulnerable to a subsequent attack by Jones on the same grounds. Jones could challenge any such agreement on the ground that it was the result of possible pressure on Jones or Worth to plead guilty rather than go to trial, at which a conflict of interest would crystallize.

My decision does not abrogate Jones' sixth amendment rights. While the sixth amendment grants a criminal defendant the unqualified right to assistance of counsel, it does not provide him with an absolute right to the counsel of his choice. *Davis v. Stamler*, 650 F.2d 477 (3d Cir. 1981). A criminal defendant's right to be represented by the counsel of his choice must be balanced against the public's interest in a fair criminal proceeding, free from future attacks. *See United States v. Flanagan*, 527 F. Supp. 902, 906 (E.D. Pa. 1981), *aff'd*, 679 F.2d 1072 (3d Cir. 1982), *cert. granted* Jan. 10, 1983. This is not a case in which the nature of the conflict is highly speculative. I have carefully considered the circumstances of this case and find that an actual conflict of interest is very likely to arise before the end of the defendant's trial. The sixth amendment guarantees all criminal defendants "the assistance of counsel for his defense." Such assistance must be "untrammeled and unimpaired." *Glasser v. United States*, 315 U.S. 60, 70 (1942). If Worth continued to represent the defendant, it is likely that a conflict of interest would arise during the trial proceedings, and therefore the defendant would not receive independent assistance of counsel as required by the sixth amendment.

For the reasons stated above, I concluded that Worth's continued representation of Jones is very likely to lead to an actual conflict of interest in this case. Worth must, therefore, be disqualified from representing the defendant. Accordingly, I granted the government's motion.

/s/ DANIEL H. HUYETT, III

Daniel H. Huyett, 3rd, Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	Criminal Action
v.	:	
JOHN D. JONES,	:	
a/k/a JACK JONES	:	NO. 82-366

Philadelphia, Pennsylvania
December 22, 1982

HEARING ON GOVERNMENT's MOTION
to
DISQUALIFY DEFENSE COUNSEL

Before HONORABLE DANIEL H. HUYETT, 3rd, *J.*

APPEARANCES:

PETER F. VAIRA, ESQ.,
UNITED STATES ATTORNEY,
Eastern District of Pennsylvania
Third Floor — United States Courthouse
601 Market Street
Philadelphia, PA 19106
BY: LYNELL N. STATON, ESQ.,
and
JOANNE A. EPPS, ESQ.
Assistant United States Attorneys

WALLACE C. WORTH, JR., ESQ.,
and
DIANNE M. DICKSON, ESQ.,
Attorneys for Defendant
515 Linden Street
Allentown, PA 18101

THE COURT: Good morning. This is a hearing pursuant to the Government's Motion to Disqualify Defendant's Counsel and it is scheduled pursuant to my Order of December 17, 1982. Are counsel ready to proceed?

MS. STATON: Yes, sir.

THE COURT: Would the Government proceed.

MS. STATON: Thank you, your Honor.

Your Honor, the Government calls Tropper Richard Diskin to the stand.

THE COURT REPORTER: What was the name?

MS. STATON: Richard Diskin.

THE COURT REPORTER: Would you remain standing, please, and state your full name?

THE WITNESS: Tropper Richard Diskin, D-I-S-K-I-N.

(Witness sworn.)

MS. STATON: May I approach the witness, your Honor?

THE COURT: Yes. There's no need to seek leave to do that in this type of proceeding, unless there is a problem and I assume there will not be.

Would you proceed?

MS. STATON: Thank you.

DIRECT EXAMINATION

BY MS. STATON:

Q. Tropper Diskin, could you state for the record what you do for a living?

A. I'm employed by the Pennsylvania State Police, currently assigned to the Bureau of Criminal Investigation in Harrisburg, Pennsylvania.

Q. And, for how long have you been assigned to that Bureau?

A. I've been assigned to the Bureau of Criminal Investigations for a little over two years now.

Q. Have you been assigned to investigate matters concerning the defendant in this case, Jack Jones?

A. Yes, I have.

THE COURT: Would you keep your voice up?

THE WITNESS: Yes, sir.

THE COURT: The both of you, so, that I could — particularly Miss Staton.

MS. STATON: Your Honor, I have to apologize. I have a very bad cold, but I will do my best.

THE COURT: All right — okay. We have to hear you and the reporters have to hear you.

CONTINUED DIRECT EXAMINATION

BY MS. STATON:

Q. Tropper Diskin, I would like to show you three complaints, all dated September 23, 1982 and I ask you if you can identify those?

A. Yes, I can, Ma'am.

Q. —can you tell us if you are the affiant on those complaints?

A. I am.

Q. And, who is charged in them?

A. On these three complaints, here, Henry Krotzer is the defendant.

Q. And, briefly, can you tell us what violations he was charged with on those?

A. Three counts of receiving stolen property, three counts of criminal conspiracy, two counts of unauthorized use of a

vehicle and sections from the Motor Vehicle Code with regards to removal or falsification of identification numbers.

Q. Can you tell us if preliminary hearings have been held in the state with regards to these charges?

A. With regard to two charges, there was a preliminary hearing held before Magistrate James Stahl in the City of Allentown on October 6th.

Q. And —

A. The third complaint was waived on I believe November 19th.

MS. STATON: Thank you, I have no further questions.

THE COURT: Cross-examination?

MR. WORTH: I have no questions, your Honor.

THE COURT: All right. Thank you.

You may step down, sir.

THE WITNESS: Thank you, Judge.

(Witness leaves stand.)

MS. STATON: The Government's next witness is Henry Krotzer.

THE COURT REPORTER: Would you remain standing, please, and state your full name?

THE WITNESS: Henry G. Krotzer.

(Witness sworn.)

MS. STATON: Your Honor, the Government requests that Mr. Krotzer be read his Constitutional rights with regard to portions of his testimony.

THE COURT: Would you do that?

MS. STATON: Certainly.

Mr. Krotzer, I would like to inform you that there are going to be certain questions asked of you today that pertain to charges that are pending against you in the state and I want you to be fully apprised that you do not have to answers [sic] these questions; that you have the right to remain silent; that anything you say can be used against you in court; that you have a right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning. If you cannot afford

a lawyer, one with be appointed for you before any questioning, if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to your — until you talk to your lawyer.

Do you understand that?

THE WITNESS: Yes.

THE COURT: Mr. Krotzer, do you have any questions concerning the warning just administered to you by the Assistant U.S. Attorney?

Do you — do you understand?

Do you have any questions?

Would you like to ask me anything concerning the warning that has just been administered to you?

THE WITNESS: No, your Honor.

I — I talked to my lawyer before I came down here.

THE COURT: You considered this before you came down here?

THE WITNESS: Yes.

THE COURT: And, you understand the warning that has just been administered to you?

THE WITNESS: I do.

THE COURT: And, you've given it to consideration before you came here? Is that what you are telling me?

THE WITNESS: Yes.

THE COURT: All right, anything else, Ms. Staton, on this point?

MS. STATON: No, sir.

THE COURT: All right, would you proceed, then?

MS. STATON: Yes, thank you.

DIRECT EXAMINATION

BY MS. STATON:

Q. Mr. Krotzer, do you know the defendant Jack Jones?

A. Yes, I do.

Q. Do you see him in the courtroom today?

A. Yes, Ma'am.

Q. Can you please point him out and describe what he is wearing?

A. Sitting next to Mr. Worth over there.

THE COURT: You must keep your voice up —

THE WITNESS: — on the end.

THE COURT: — sir, if you would. Keep your voice up.

A. (Continuing) The man on the end, sitting next to Mr. Worth.

MS. STATON: Your Honor, may the record reflect the witness has identified Jack Jones?

THE COURT: Yes.

MS. STATON: Thank you.

Q. How do you know him, Mr. Krotzer?

A. I worked for Mr. Jones for about four years.

THE COURT: You must speak a little louder. We —

A. (Continuing) I worked for Mr. Jones for about four years.

THE COURT: We're making a record of this and that mike is not working as well as it should. You must speak up. Thank you.

Q. Prior to the time that you started working for Mr. Jones, did you know him?

A. Yes, I knew him for off and on for maybe 20 years.

Q. Again, just try to really keep your voice up, Mr. Krotzer.

A. Off and on for 20 years I met him, talked to him. I knew him.

Q. Do you know Mr. Wallace Worth?

A. Yes, I do.

Q. Do you see Mr. Worth in the courtroom today?

A. He's sitting next to Mr. Jones there.

MS. STATON: Your Honor, again, may the record reflect that the witness has identified Wallace Worth?

THE COURT: Yes.

Q. How do you know Mr. Worth?

A. He was my lawyer.
Q. When was that, Mr. Krotzer?
A. It was from when you first impounded the trucks, up until I think, the 19th or — my last hearing, Just before the last hearing.
Q. Now, when you say when they first impounded your trucks, can you give us an approximate date for that?
A. Ah —
Q. Could that have been in June of this year?
A. Yes, June.
Q. And, when you say your last hearing, was that November of 1982?
A. November, 1982. Yes. November, 1982.
Q. Now, directing your attention to the incident with the trucks in June of this year, what contact did you have with Wallace Worth and under what circumstances?
A. Well, I never really had contact with him, personally, at all, until after I was arrested.
Q. Well, let's start at the beginning.
You said that your trucks were impounded?
A. Right.
Q. Exactly what happened, Mr. Krotzer?
A. Well, they had a search warrant to search the truck, because they had on there that it was supposed to have stolen parts in it.
Q. And, your truck was impounded by state authorities —
A. Yes —
Q. — is that correct?
A. It's impounded right now.
Q. Were any efforts made to have that truck returned to you?
A. Yes, Mr. Worth — ah —
Q. Could you keep your voice up, please?
A. Yes.
Mr. Worth was keeping in contact, trying to get it back.
Q. Now, you said that you didn't have any direct contact with Mr. Worth?
A. No.

Q. How do you know that Mr. Worth was making any efforts to get your truck back?

A. Mr. — Mr. Jones is the one who got Mr. Worth to go to work on it and that's what Mr. Jones was telling me.

Q. Can you keep your voice up?

Did you say that's what Mr. Jones —

A. Yes.

Q. — told you?

A. Yes, that's what Mr. Jones told me.

Q. Thank you.

Did you have to sign anthing in connection with getting your trucks back?

A. Well, I went up one day. He told me I had to go to the office and sign some papers and I went to Mr. Worth's office and his secretary come out and I signed two blank forms.

Q. You signed them at Mr. Worth's — Worth's office?

A. Yes.

Q. And, who told you you have to go there to sign the papers?

A. Mr. Jones said I had to go down.

Q. Directing your attention to September 28, 1982, do you recall the events of that day?

A. Yes, I was arrested.

Q. I'd like to show you copies of the complaints that have been issued in your name — that are on these complaints. Can you identify those?

A. Yes, I can.

Q. Are these the reasons that you were arrested on September 28th?

A. Yes, these are the reasons.

Q. Do you know why you were arrested?

A. Yes.

Q. Can you explain that to us?

A. Only — ah — on there, it says about stolen truck parts, conspiracy — ah — on three counts and — ah — receiving stolen goods and — ah — driving a vehicle without owner's consent.

Q. Now, I'm not going to ask you any specifics about these charges, because they're still pending against you in state court; is that correct?

A. Right.

MS. STATON: However, your Honor, I would like to bring to the notice of the Court the fact that the International Harvester tractor vehicle, Identification No. DF227HHA10108 named in one of the complaints, one of the three complaints against Mr. Krotzer, is also charged in Counts 3 and 4 of the Federal indictment against Defendant Jones.

THE COURT: All right, I will take judicial notice of that, in the absence of any objection.

Q. Mr. Krotzer, was your wife present when you were taken into custody?

A. Yes, she was.

Q. What, if anything did she do at the time that you were arrested, if you know?

A. Well, I told her to call Jack — Mr. Jones and tell him to get a hold of Wally Worth.

Q. Why did you tell her to get a hold of Wally Worth?

A. Because that's what I was told to do, if anything happened. I was supposed to get a hold of Wally Worth.

Q. And, who told you to do that if anything happened?

A. Mr. Jones.

Q. Do you know if she in fact called Mr. Jones?

A. Yes, I do.

Q. You know and did she call him?

A. Yes, she did.

Q. What happened when you arrived at the police station?

A. Well, there was a phone call there for me.

Q. Can you keep your voice up, please?

A. There was a phone call in there for me and it was Mr. Worth on the phone.

Q. Did you speak to him at that time?

A. Yes, I did.

Q. Concerning this case?

A. He just told me not to say anything.

Q. Was bail set? Were you released that day?
A. Yes, I was released on my own recognizance.
THE COURT REPORTER: What was that?
THE WITNESS: I was released on my recognizance.
Q. Following your release on September 28th of this year, did you have a conversation with Mr. Jones?
A. Yes, I went — after I was released, I went up to — up to the office to the — to the garage.
Q. Up to whose office?
A. Mr. Jones — up to the garage.
Q. What was discussed during this conversation?
A. Well, we discussed — I had the charges there and we had to go to town to see Mr. Worth, which I think was the next day or that afternoon. I'm not quite sure.
Q. Did you in fact go to see Mr. Worth —
A. Yes.
Q. — concerning these charges?
A. Yes, me and Mr. Jones went down.
Q. Do you recall how you got there?
A. In Mr. Jones' car.
Q. And, this was, you think the next day?
A. And, I think — it was either that afternoon or the next day.
Q. Did you have conversations at Mr. Worth's office that next day or that same afternoon following your arrest concerning the charges — the state charges brought against you?
A. Yes.
Q. Can you recall who was present during your conversations, if anyone, during your conversations with Mr. Worth?
A. Yes, it was Mr. Worth and Dianne Dixon and Jack Jones.
Q. Please remember to keep your voice up.
A. I'm sorry.
Q. I think we heard that part, though.
Did Mr. Worth ask you any questions at this meeting?

A. Yes.
Q. What did he ask you?
A. He asked me if I knew anything about anything that's on there, on any of the charges.
Q. And, what did you say?
A. I told him no, the only thing I knew about was the Lincoln and I couldn't really say the truth on that, because I got a dirty look when I even mention that, from Mr. Jones.
Q. Can you keep your voice up?
You got a dirty look —
A. Yes.
Q. — when you mentioned that? From whom —
A. I — I wasn't supposed to say nothing about it to nobody, that I knew anything about it.
Q. Who told you that?
A. Mr. Jones.
Q. After you mentioned the Lincoln to Mr. Worth — is the Lincoln one of the vehicles mentioned in one of these complaints?
A. Yes it is.
Q. After you mentioned that to Mr. Worth, how did the remainder of the conversation go?
A. Well, the remainder of the conversation, I just answered — when he asked about certain parts in that, Mr. Jones and I just said, well, did this part come for a wreck over in the junkyard, this part come here and I — and I know nothing about this other truck and I just agreed with everything. That's all.
Q. Now, again, you're not being quite clear.
Who responded to Mr. Worth's questions?
A. Mr. Jones more than me.
Q. And, then, what did you do after Mr. Jones would respond to the questions?
A. I'd agree.
Q. To your knowledge, was Mr. Jones answering Mr. Worth's questions truthfully during this meeting?
A. No.

Q. But, you were agreeing to everything he said, anyway; is that correct?

A. Yes.

Q. Because Jones had given you a signal?

A. Yes.

Q. As far as you were concerned, Mr. Krotzer, was Mr. Worth your lawyer, as you were talking to him in his office?

A. Yes.

Q. When did you next see or talk to Mr. Worth?

A. It was the day of the hearing at Mr. Stahl's which was —

Q. Magistrate Stahl's?

A. Yes, which was on the 6th, I think. October 6th.

Q. How did you get to that hearing?

A. Mr. Jones.

Q. Did you know that Mr. Worth would be representing you at that hearing?

A. Yes, I did.

Q. So, you expected to see him there?

A. Yes, I did.

Q. And, was he in fact there at the hearing?

A. Yes, he was.

Q. I'd like to show you a copy of a transcript, dated October 6th, 1982 (handing).

This is a preliminary hearing in front of Magistrate James E. Stahl, S-T-A-H-L, in Allentown, Pennsylvania.

Can you identity that transcript?

A. Yes.

Q. First of all, have you ever seen it before?

A. Yes, I have.

Q. When did you see it?

A. I seen it today.

Q. Could you speak up, please?

A. I seen it today.

Q. In my office?

A. In your office.

Q. And, did you look through this transcript?

A. Yes, I did.

Q. And, is this an accurate representation of what took place the preliminary hearing in front of Magistrate Stahl?
A. Yes, it is.
Q. Mr. Krotzer, when is the next time, if at all, that you saw or talked to Mr. Worth?
A. That was on the 19th of —
THE COURT: 19th of what?
THE WITNESS: 19th of November.
THE COURT: '82?
THE WITNESS: '82.
Q. And, you haven's seen or talked to him since your first hearing; is that correct?
A. That's correct.
Q. What took place on November 19th, 1982?
A. Well, a situation arised where I got another lawyer, because I felt that he wasn't able to do a job for me.
Q. First of all, where did you see Mr. Worth?
A. At the hearing. Mr. Stahl's.
Q. You had a second preliminary hearing on one of these three complaints; is that correct?
A. Yes, I did.
Q. And, when you showed up for the hearing, Mr. Worth was there?
A. Yes, he was.
Q. And, you had a discussion with Mr. Worth.
A. Yes, I did.
Q. What did you say?
A. I told Mr. Worth [illegible] had another lawyer and that I didn't need him any m[illegible]
Q. Who was this other lawyer?
A. He's a public defender — ah —
Q. That's — he was a public —
A. Yes.
Q. — defender in Allentown?
A. Yes.
Q. So, Mr. Krotzer, is Mr. Worth still your lawyer today?
A. No, he isn't.

Q. Why not? What reasons did you give him for discharging him?
A. Well, I gave him the reasons — I couldn't tell him the truth and it was really, you know, if you can't tell the truth to the lawyer, you can't tell the truth to nobody.
Q. Were there any particular circumstances that made you believe you couldn't tell him the truth or that — uhm — would give you more reason to want to discharge him?
A. Yes, there was. Mr. Jones got a call over in New Jersey one day and I —
Q. I'm sorry. I didn't understand that. Could you speak up?
A. Mr. Jones got a call from New Jersey one day about an engine that was in the truck and he told the guy on his phone that he bought it from Henry Krotzer and I felt right there that Henry is going to get put in the woodpile.
Q. What does that mean?
A. That means, like, he was going to let Henry — you know, he's just putting something else on me. Here, a stolen motor, I have these charges and he tells the guy in New Jersey that he bought the engine from Henry Krotzer and that's what I need on top of the other charges, is that — a stolen engine that I sold to him.
Q. Well, are you saying then, that — tell me if I'm correct. Are you saying that one of the reasons for discharging Mr. Worth is that — was that you didn't feel you could trust Mr. Jones?
A. Right, I didn't — I didn't know what was going to happen if they were going to, you know, when it comes to lawyers — if it comes down to brass taxes, he's going to defend Henry Krotzer or Mr. Jones and I wasn't paying the bill.
Q. So, you weren't sure if you could trust Mr. Jones, either?
A. Right.
Q. Have you ever spoken to Government agents — I'm sorry.

You weren't sure you could trust Mr. Worth, either?
A. Yes. Yes, that's right.
Q. Have you spoken to Government agents about your involvement in this case, as well as the involvement of others?
A. Yes, I have.
Q. You've agreed to cooperate with the Government in this case; have you not?
A. Yes, I have.
Q. Has the Federal Government made any threats or promises to you—
A. Nothing.
Q. —in exchange for your cooperation to date?
A. None, whatsoever.
Q. And, do you expect to testify against Jack Jones, if this case in fact goes to trial?
A. I gave — ah — my lawyer said that's what I should do and that's what I'm going to do.
MS. STATION: I have no further questions, your Honor.
THE COURT: Cross-examination?

CROSS EXAMINATION

BY MR. WORTH:

Q. Mr. Krotzer, I believe you said you never saw me in your life until you were arrested; is that not correct?
A. That's right.
Q. And, sir, the document you had signed in my office had to do with a civil matter; did it not, a replevin of a motor vehicle?
A. I guess — I don't know. I signed a blank.
Q. And, did you get a vehicle back that had been impounded?
A. Yes, I did.
Q. And, that involved, I believe, Lehigh Valley Salvage; did it not?
A. Yes, it did.

Q. You were the plaintiff and Lehigh Valley Salvage was the defendant; is this correct?

A. Correct.

Q. And, they did return the vehicle to you; did they not?

A. Yes, they did.

Q. Now, sir, did you and I at that time have any confidential discussions concerning any criminal conduct?

A. No. No, we never did.

Q. When were you arrested—

THE COURT: Mr. Worth—

MR. WORTH: Yes, sir?

THE COURT: Don't seek conclusions. We're after facts. I would prefer that you phrase — rephrase that question.

Q. Did you discuss any crimes in any aspect at all with me at that time?

A. No, I never met you until the day after I was arrested.

Q. Now, when were you arrested, if you recall, sir?

A. It was on the 28th of September.

Q. And, is it fair to say the first you saw me was when you appeared at my office with Mr. Jones?

A. Yes, that's right.

Q. And, at that time, with the exception of the fact that you said you were involved with a Lincoln automobile, did you discuss any criminal conduct with me?

A. No, I didn't.

Q. As a matter of fact, I told you I would be willing to represent you at a preliminary hearing; did I not?

A. Yes, you did.

Q. And, did I tell you that later on you may have to get other counsel?

A. No, you did not.

Q. I did not?

A. No, you did not.

Q. All right. Did I tell you what a preliminary hearing was about?

A. It was to find out if I was — if it would be going to court or get it dismissed.

Q. All right. Do remember the term, "prima facie case"?
A. No, I don't.
Q. You don't remember that term?
Did I tell you at the preliminary hearing your guilt or innocence would not be determined?
A. Yes, that's what you said.
Q. I told you that, yes.
And, I went to the hearing; did I not?
A. Yes, you did.
Q. And, that was before James Stahl. Did you discuss with me at the hearing any criminal conduct on your part?
A. No, none whatsoever.
Q. Who paid me to represent you at that time, if you know?
A. Mr. Jones.
Q. And, sir, I believe you indicated today to this Court that I represented you until the 19th of November; is that correct?
A. That's correct.
Q. Was Mr. Jones under arrest at that time when you had your hearing?
MS. STATON: Excuse me, your Honor, which hearing?
MR. WORTH: The only one I attended.
THE COURT: All right, Would you rephrase the question, Mr. Worth, rather than —
Q. When you had the preliminary hearing, sir—
A. Yes?
Q. — where I cross examined witnesses, was Mr. Jones under arrest then?
A. Yes, he was.
Q. Are you sure of that?
A. I'm not sure.
Q. You're not sure?
A. But —
Q. Okay. If you're not sure, sir, you just say don't know.
A. I don't know.
Q. All right. Do you have federal charges against you?

A. Not yet.
Q. Not yet.

Now, are you aware or did you have knowledge of the fact that I had called your home a number of times in an effort to prepare your case?
A. Yes, I did.
Q. And, do you know the answers I received when I would call there?
A. I don't know. I wasn't there.
Q. Did you ever talk to me?
A. No.
Q. You are aware, are you not, that your wife said that you were on runs in New Jersey?
A. Yes.
Q. She told you that; didn't she? Did she?
A. That you talked — talked to her?
Q. Yes, sir; and in fact, you were home much of the time; weren't you?
A. No, I wasn't. I wasn't at my house there.
Q. So, then, you never talked to me in regards to preparing the case; did you, sir?
A. No, I did not.
Q. In the meantime, you were in contact with FBI Agent David Kolde; were you not?
A. He was talking to me.
Q. Yes. And, Trooper Diskin?
A. Yes.
Q. They had been talking to you; had they not?
A. Yes, they had.
Q. And, did they suggest to you that I should not represent you, because I represented Mr. Jones?
A. I come on that decision myself when that —
Q. Do you understand my question?
A. I understand.
Q. Did they say that to you?
A. No, they didn't.
Q. They said nothing like that to you?
A. No, they didn't.

Q. Sir, you went to the public defender's office in Lehigh County; did you not?
A. Yes.
Q. Who was with you?
A. They were with me, because I asked them to be with me. I wanted to know how to go about it, because I didn't have no money to get a lawyer.
Q. But, you went to the public defender; that's free, isn't it?
A. Yes.
Q. Yes, sir.
A. And, they helped me through the paperwork and everything.
Q. Do you remember who did the talking there?
A. I think they both talked.
Q. They both talked. You didn't do the talking; did you, sir?
A. A little bit.
Q. Did you ever call me and tell me not to appear on the 19th of November, that in fact, you had other counsel. namely Donald Wieand?
A. No, I didn't.
THE COURT REPORTER: Spell it.
MR. WORTH: I believe that's W-I-E-A-N-D.
Q. And, so, I appeared on the 19th of November; did I not, at the hearing before James Stahl?
A. Yes, you did.
Q. And, Mr. Wienad was there, also?
A. Yes, he was.
Q. And, was Frederick Charles, attorney, also there, from the Public Defender's office?
A. Yes, he was.
Q. And, we had a discussion, then; did we not —
A. Yes, we did.
Q. —in Mr. Stahl's private office?
A. Right.
Q. And, in that room, were you and I ever alone?
A. No, we were never alone.

Q. Do you recall who was present in that room?
A. It was — ah — it was Mr. Wieand, you, Dianne Dixon, Mr. Charles.
Q. So, at that time, all we discussed was your representations; did we not?
A. That is right.
Q. Did we discuss any criminal conduct on your part during that conference at any time?
A. No, we did not.
Q. With the exception of mentioning that you were involved with a Lincoln automobile, sir, at any time in your life, have you discussed criminal conduct on your part with me?
A. No, I didn't.
Q. Did you ever meet alone with me and have any confidential discussions?
A. No, I never did.
MR. WORTH: Thank you. I have no further questions, your Honor.
THE COURT: Cross-examination —
MS. STATON: If I may —
THE COURT. Or, redirect, I'm sorry.
MS. STATON: If I may have one moment, your Honor?
THE COURT: Yes.

REDIRECT EXAMINATION
By MS. STATON:

Q. Mr. Krotzer, at the first meeting that you had with Mr. Worth and Miss Dixon and Mr. Jones in Mr. Worth's office the day after you were arrested — do you recall that meeting?
A. Yes, I do. Yes, I do.
Q. And, he asked you about — he asked you whether or not you knew anything about the case and you started to tell him about the Lincoln and then, you were interrupted; is that correct?
A. That's correct.

Q. Did Mr. Worth ask any other questions to you or to Mr. Jones in your presence about this particular case while you were there?

A. Yes, he asked where — where the parts come from — that were on the International, like the sleeper box and Mr. Jones said come out of the junkyard, off a junked Kenworth.

Q. So, these were the types of questions that Mr. Jones was responding to and then you were just agreeing to —

A. Right.

Q. — is that correct?

A. Yes, and he asked about the tractor, if we knew anything about that.

Q. And, these were also the responses by Mr. Jones, that you testified were untruthful at the time —

A. Right.

Q. Is that correct?

A. That's correct.

MS. STATON: I have no further questions, your Honor.

THE COURT: Recross?

MR. WORTH: Pardon me, your Honor.

RECROSS EXAMINATION

BY MR. WORTH:

Q. Then, you didn't tell me anything; did you sir?

A. No, really, I didn't tell you anything.

MR. WORTH: Not really, that's correct. Thank you sir.

THE COURT: Are we finished with the witness?

MS. STATON: Yes, sir.

THE COURT: Thank you. You may step down sir.

(Witness leaves stand.)

MS. STATON: Your Honor, the Government offers the documents that have been identified — ah — the three complaints — the state complaints, in which Krotzer has been charged and the transcript, if your Honor wants to take a look at these.

THE COURT: Have you given them numbers?

MS. STATON: No, sir.

THE COURT: Why don't you — Why don't you label them for identification purposes. You can — you can call them G-1, G-2 —

MS. STATON: Fine.

THE COURT: — and G-3.

Do you wish to have them admitted in evidence or merely have me look at them?

MS. EPPS: Have them admitted.

MS. STATON: I would like to have them admitted.

THE COURT: Any objection to G-1 —

MR. WORTH: No objection, your Honor.

THE COURT: — G-2 and G-3?

MR. WORTH: No objection.

Rather than cluttering the record — if the purpose for admitting transcripts is for showing that it was at the hearing. There's no question, I will stipulate to that.

MS. STATON: There's more to that than that, your Honor. We ask that they be admitted.

THE COURT: All right. Are there three exhibits, is that correct? What are —

MS. STATON: There are four.

THE COURT: All right, what — what are they?

MS. STATON: This is —

THE COURT: What is G-1?

MS. STATON: G-1 is the complaint issued by the State Police — the State of Pennsylvania against Henry G. Krotzer, dated September 23, 1982 and the complaint number is E26172.

MS. EPPS: Excuse me, your Honor.

MS. STATON: G-2 is Complaint E26173, issued on September 23, 1982 against Henry G. Krotzer, by the Commonwealth of Pennsylvania. G-3 is Complaint No. E26170, issued on September 23, 1982 against Henry G. Krotzer, by the Commonwealth of Pennsylvania and G-4 is a two-volume copy of a transcript of the preliminary hearing that was held on Wednesday, October 6, 1982 in front of Magistrate James E. Stahl in Allentown, Pennsylvania.

THE COURT: All right, all of those exhibits, G-1, G-2, G-3 and G-4 are all admitted in evidence.

(Whereupon, the above-referred to exhibits were admitted in evidence.)

THE COURT: What else?

MS. STATON: Nothing further, your Honor.

THE COURT: All right, Mr. Worth?

MR. WORTH: Mr. Jones, would you take the stand?

THE COURT REPORTER: Would you state your full name, please?

THE WITNESS: John D. Jones.

(Witness sworn.)

DIRECT EXAMINATION

BY MR. WORTH:

Q. Mr. Jones, state your name and address for the record, please?

A. John D. Jones, RD 3, Slattington, Pennsylvania.

Q. Sir, you're the defendant in certain federal charges; are you not?

A. Yes, sir.

Q. Had a search warrant ever been served upon you by the federal authorities concerning this — these charges?

A. I don't follow that.

Q. Was a search warrant ever served upon you and your premises searched by the federal agents?

A. Yes, sir.

Q. And, do you recall when that was, sir?

A. (No response.)

Q. Approximately.

A. Two years ago.

Q. Could it have been around May of '81?

A. Ah — yes. Yes, the date — yes, it would be the 18th or 19th.

Q. All right, sir, Did you contact me concerning this?

A. Yes.

Q. Has any other lawyer participated in the matters arising out of that search warrant since that date, any other lawyer but myself on your behalf?

A. No. Dianne Dixon, you know, the — Wallace Worth.

Q. Now, sir — ah —

THE COURT: What was the answer? Would the — ah —

MR. WORTH: I believe he said only Wallace Worth, your Honor.

THE COURT: All right.

Q. Sir, when Mr. Krotzer was arrested, were you under arrest?

A. No.

Q. Where you under arrest in October of 1982?

A. I'm not much good in — I — I'm under arrest now. I don't know what the date is.

Q. Now you are?

A. Yes.

Q. When we attended the hearing — you were present at the hearing of Mr. Krotzer; were you not?

A. Yes, sir.

Q. Were you under arrest then?

A. No.

Q. Had you brought Mr. Krotzer to my office?

A. Yes.

Q. You were indicted by a federal grand jury on November 9, 1982; were you not?

A. Yes, sir.

Q. Now, sir, when you were present with Mr. Krotzer in my office, did Mr. Krotzer discuss any criminal conduct on his part with me?

A. No.

Q. The hearing that was attended before District Justice Stahl, was that a public hearing?

A. I —

Q. Do you understand my question?

A. No.

Q. Were there other — were there people there —
A. Yes.
Q. — people free to come and go?
A. Yes.
Q. Did Mr. Krotzer testify at that hearing?
A. No.
Q. Who had paid me to be there on behalf of Mr. Krotzer?
A. I did.
Q. Why did you do that, sir?
A. The two trucks that were impounded — I had — I had interest in those trucks.
Q. Had these been titled in Mr. Krotzer's name? Whose name were they in?
A. At the time, they were in his.
Q. And, you say you had an interest in those vehicles?
A. Yes.

MR. WORTH: I have no further questions, your Honor.

THE COURT: Cross-examination?

MS. STATON: No questions.

THE COURT: Thank you, sir. You may step down.

MR. WORTH: Oh, if I may, there is one point. I — I apologize to the Court.

THE COURT: All right, go ahead.

CONTINUED DIRECT EXAMINATION

BY MR. WORTH:

Q. Sir, do you know of any conflict of interest that would exist to your detriment if the Court were to see fit to not disqualify me as your defense counsel?

MS. STATON: Objection.

THE COURT: Sustained. You're seeking a conclusion from this witness. We're seeking facts, not conclusions.

If you want to reach that point, you'll have to lay a foundation. I don't know what education this witness has. I don't know if he is able to answer this question.

I have sustained the objection. Would you proceed, sir?

MR. WORTH: May it please the Court, what I was going to ask, and I might state to the Court, that the American Bar Association just came down with a whole treatise on the subject —

THE COURT: We're trying to make a factual record here.

MR. WORTH: Yes, sir. And, what I'm —

THE COURT: My ruling is based upon that.

MR. WORTH: What I'm concerned about, your Honor, is whether or not, if there were any possible conflict, that this man could knowingly waive it, that situation.

THE COURT: I've ruled.

MR. WORTH: No further questions.

THE COURT: I take it there's no cross-examination?

MS. STATON: No, sir.

THE COURT: All right. Thank you.

(Witness leaves the stand.)

THE COURT: Other testimony, Mr. Worth?

MR. WORTH: May I ask your indulgence, your Honor, for a moment?

THE COURT: Yes, of course.

(Whereupon, Ms. Dixon and Mr. Worth conferred, after which the following transpired:)

MR. WORTH: Your Honor, I'd like to call Agent Kolde to the stand. David Kolde.

THE COURT: Very well.

THE COURT REPORTER: Would you state your full name, please?

THE WITNESS: David Kolde. K-O-L-D-E.

(Witness sworn.)

DIRECT EXAMINATION

BY MR. WORTH:

Q. Sir, would you state your name and address for the record, please?

A. David Lee Kolde, assigned to the Allentown office of the FBI.

Q. Sir, you're familiar with Henry Krotzer; are you not?
A. Yes, I am.
Q. I believe you attended a preliminary hearing before District Magistrate James Stahl in Allentown, Pennsylvania; didn't you?
A. I was there. yes.
Q. Yes, sir. You observed?
A. Sure did.
Q. You were there physicially.
At that time, was Jack Jones under arrest?
A. No, he was not.
Q. Did you, sir, or any other law enforcement officer in your presence ever suggest to Henry Krotzer that there was a conflict of interest in my representing him?
A. No, I did not.
Q. Did you appear at the office of the Public Defender on behalf of Mr. Krotzer?
A. I appeared with Mr. Krotzer. Yes.
Q. Yes, sir. And, you spoke there on his behalf; did you not?
A. Yes, I did.
Q. And, did you not tell that office that there was a conflict of interest and he needed another lawyer?
A. No, I did not. My only purpose for attending with Mr. Krotzer was at his request and the only thing we did that day was obtain the necessary forms, so that Mr. Krotzer could fill them out to obtain the services of a Public Defender.
Q. And, you did not discuss the conflict with him, nor did Trooper Diskin in your presence?
A. Not in my presence and I did not.
Q. Not in your presence. Thank you, sir.
MR. WORTH: I have no further questions.
THE COURT: Cross-examination.
MS. STATON: No questions.
THE COURT: Thank you, sir. You may step down.
(Witness leaves the stand.)
MR. WORTH: Nothing further, your Honor.

THE COURT: All right, is there — is there any further evidence or testimony by the Government or defendant?

MS. STATON: Not from the Government, sir.

THE COURT: All right, are we — are counsel ready for argument? Shall we have argument?

* * * * *

(Whereupon, a recess was taken, after which the following transpired in open court with all counsel and the defendant being present;)

THE COURT: I have considered the motion of the Government to disqualify counsel, the response filed by defendant, the record produced today, memoranda filed, arguments of counsel and I will grant the Government's motion.

I will shortly file a statement of reasons in support of the action I take today. Thank you.

(Court was adjourned at 12:45 p.m.)

Office - Supreme Court, U.S.
FILED
FEB 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-900

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN D. JONES, a/k/a JACK JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MARGARET I. MILLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court abused its discretion when it disqualified petitioner's trial counsel because of counsel's prior representation, on related criminal charges, of an important witness for the prosecution.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Cuyler v. *Sullivan*, 446 U.S. 335 5

Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206 4

Hunydee v. *United States*, 355 F.2d 183 6

Ross v. *Heyne*, 638 F.2d 979 7

Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U.S. 449 4

United States v. *Dolan*, 570 F.2d 1177 6-7

United States v. *Kitchin*, 592 F.2d 900, cert. denied, 444 U.S. 843 7

United States v. *Nobles*, 422 U.S. 225 8

United States v. *Provenzano*, 620 F.2d 985, cert. denied, 449 U.S. 899 6

Statutes and rules:

18 U.S.C. 1341 2

18 U.S.C. 2313 2

18 U.S.C. 2315 2

Page

Statutes and rules—Continued:

18 U.S.C. 3161(c)(1) 5

28 U.S.C. 1291 4

Fed. R. Crim. P. 44(c) advisory committee note 5, 8

Model Rules of Professional Conduct (1983):

Rule 1.6 7
Rule 1.7 10

Model Code of Professional Responsibility (1980):

DR 4-101 7

DR 5-101 8

DR 5-102 8

Miscellaneous:

77 F.R.D. 507 (1978) 5, 8

2 *Weinstein's Evidence* (1982) 6

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-900

JOHN D. JONES, a/k/a JACK JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported. The opinion of the district court (Pet. App. A4-A11) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983. The petition for a writ of certiorari was filed on November 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1982[1] a grand jury sitting in the Eastern District of Pennsylvania indicted petitioner on multiple counts charging him with receiving and selling motor

---

[1]The September and November 1983 dates appearing on pages 3 and 4 of the petition are apparently printing errors. See Pet. App. A5-A7.

vehicles stolen from interstate commerce, in violation of 18 U.S.C. 2315 and 2313 (Counts 1-5), and mail fraud, in violation of 18 U.S.C. 1341 (Counts 6-8). Petitioner retained Wallace C. Worth, Jr., to represent him. Because Worth had previously represented a key government witness, Henry Krotzer, following his arrest on related state charges, the government moved to disqualify Worth from representing petitioner. Following an evidentiary hearing on the government's motion, the United States District Court for the Eastern District of Pennsylvania disqualified petitioner's counsel (Pet. App. A11). The court of appeals accepted petitioner's interlocutory appeal and affirmed by judgment order (Pet. App. A1-A2).

1. Evidence presented at the disqualification hearing revealed that petitioner buys and sells used tractor trailor and truck parts. In June 1982, state officials obtained a search warrant for and impounded a truck belonging to Henry Krotzer, one of petitioner's employees. Petitioner thereafter arranged for attorney Worth to help Krotzer repossess the truck (Pet. App. A5). Petitioner also told Krotzer that, should he be arrested as a result of the search, he should contact Worth immediately (*id.* at A20).

In September 1982, Krotzer was arrested on state charges, which included receiving stolen property, unauthorized use of a motor vehicle, conspiracy, and falsification of an identification number (Pet. App. A5). The state charges named petitioner as a co-conspirator (*ibid.*). Upon his arrest, Krotzer asked his wife to telephone petitioner, and petitioner, in turn, contacted Worth (*ibid.*). Worth then called Krotzer at the police station and told him to make no statements to the police (*ibid.*).

The following day, Krotzer was released and went to petitioner's garage to discuss the charges with him. Petitioner instructed Krotzer not to reveal anything he knew

about the activities charged in the state complaint, including petitioner's participation therein (Pet. App. A5-A6). He then took Krotzer to Worth's office, where the attorney questioned the two men regarding the state charges. At one point during this interview, when Krotzer indicated that he knew something about one of the vehicles mentioned in the state charges, petitioner gave Krotzer a "dirty look" (*id.* at A6, A22). Petitioner then answered the remainder of Worth's questions (*id.* at A6). Krotzer testified that he agreed with petitioner's responses to Worth, even though they were not accurate, because of the "dirty look" petitioner had given him when he had volunteered the truth (*id.* at A16-A25).

Following this interview, Worth represented Krotzer at the first preliminary hearing on the state charges.[2] Soon thereafter, Krotzer went to the Lehigh County Public Defender's office to seek another attorney because he distrusted Worth and petitioner (Pet. App. A25). At a second preliminary hearing held on November 19, 1982, Krotzer informed Worth that he no longer desired Worth's services (*id.* at A24-A25).

2. After detailing the above facts, the district court found that, given the nature of Worth's prior representation of Krotzer, the attorney should be disqualified from continued representation of petitioner in the instant prosecution (Pet. App. A11). The court noted that the government intends to call Krotzer as a prosecution witness (*id.* at A10). It then properly reasoned that, during cross-examination of

---

[2]The district court found that, throughout this hearing, "Worth acted as if he were representing the interests of both [petitioner] and Krotzer. He vigorously cross-examined the witnesses about [petitioner]. Although [petitioner] was not a defendant at the hearing, Worth objected when some testimony was elicited regarding [petitioner]" (Pet. App. A6). Petitioner, moreover, paid Worth's fee for representing Krotzer (*id.* at A28).

Krotzer, "Worth would be faced with a former client testifying to facts inconsistent with those disclosed to him in a confidential communication. Worth would be tempted to use the prior inconsistent statements made by Krotzer when he assented to [petitioner's] statements at the meeting to impeach Krotzer, in an effort to zealously defend petitioner" (*ibid.*). Alternatively, the court noted that it was "also possible that Worth, aware of his obligation to his former client, would overcompensate and be less then zealous in his cross-examination of Krotzer thereby denying [petitioner] his sixth amendment right to effective assistance of counsel" (*ibid.*). In either circumstance, the court held that "an actual conflict of interest is very likely to arise before the end of the [petitioner's] trial" (*id.* at A11). It accordingly granted the government's motion.

ARGUMENT

Petitioner argues (Pet. 7-15) that the trial court's order unjustifiably interferes with his right to counsel of choice. This essentially fact-bound contention does not merit review by this Court.

1. At the outset, we note that this case raises the threshold issue of the court of appeals' jurisdiction under 28 U.S.C. 1291 to hear petitioner's interlocutory appeal. While this question was not raised below, jurisdictional matters may be addressed for the first time in this Court. See, *e.g.*, *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 451-452 (1935). For the reasons stated (at 14-36) of our brief in *Flanagan* v. *United States*, No. 82-374 (argued Nov. 30, 1983), we submit that a pretrial order disqualifying defense counsel is not a "final decision" of a district court under 28 U.S.C. 1291 and hence is appealable only after conviction and imposition of

sentence.[3] Indeed, this case demonstrates the principal evil of ignoring the final judgment rule in the context of a criminal prosecution: unnecessary and debilitating delay.[4]

2. In any event, however this Court may dispose of the jurisdictional issue in *Flanagan*, this case does not merit review because the decision of the lower courts is correct on the merits. The main thrust of petitioner's choice-of-counsel arguments (Pet. 8-15) appears to be that the district court erred in finding that a conflict of interest is inherent in Worth's representation of petitioner. The record in this case, however, amply supports the district court's finding that an actual conflict of interest is likely to arise should Worth continue representing petitioner.[5]

a. Petitioner is charged with conspiring with Krotzer and others to receive and sell stolen tractors. Krotzer's testimony regarding his dealings with petitioner, therefore, will be a central part of the government's case. Worth, moreover,

---

[3]We are serving petitioner with a copy of our brief in *Flanagan*.

[4]Petitioner's trial has been delayed more than nine months during the pendency of his appeals and petition to this Court. Had the court of appeals disposed of his case by means of a signed opinion rather than a judgment order (Pet. App. A1), the delay could well have been even greater. Cf. 18 U.S.C. 3161(c)(1) (Speedy Trial Act provision requiring trial to begin within 70 days of indictment).

[5]Petitioner argues (Pet. 8-10) on the basis of *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), that disqualification cannot be ordered in advance of trial unless there is a demonstrated "actual" conflict. But, although *post-trial* reversal may be justified only where a defendant demonstrates that "an actual conflict of interest adversely affected his lawyer's performance" (446 U.S. at 350), such a standard plainly is not appropriate for prophylactic, pre-trial inquiries into potential conflicts of interests. Fed. R. Crim. P. 44(c) expressly provides for pre-trial inquiries into possible conflicts of interest, and the advisory committee note to that Rule states that "it is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by continued * * * representation, even when an actual conflict is not then apparent." 77 F.R.D. 594, 596 (1978).

previously represented Krotzer on related state charges.[6] During the course of that representation, Krotzer met with Worth, discussed the state charges against him, admitted that he had information regarding one stolen automobile, and thereafter concurred in petitioner's allegedly erroneous explanations of the facts underlying the state and federal charges (Pet. App. A5-A6).

The district court properly ruled that these communications between Krotzer and Worth were confidential communications protected by the attorney-client privilege,[7] and that Worth would be hard pressed at trial not to cross-examine Krotzer regarding possible inconsistencies between his trial testimony and prior position during the interview. To paraphrase the petitioner, there is "no question" but that Worth has "obtained confidential communications from both clients" and that his continued representation of petitioner will force him "into a position of cross-examining one of his own clients in order to protect the interest of his other client" (Pet. 12). In such circumstances, disqualification is entirely appropriate. *United States* v. *Provenzano*, 620 F.2d 985, 1004-1005 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Dolan*, 570 F.2d 1177, 1184 (3d

---

[6]The transactions charged in counts 3 and 4 of the federal indictment form the basis for one of the state charges against Krotzer (Pet. App. A20).

[7]Communications between a client and his counsel are generally non-privileged when a third party is present during the interview. The presence of more than one client at a conference with an attorney, however, does not destroy the privilege. Such communications are protected, despite the presence of the second client, if the communication refers to a matter of common interest. See *Hunydee* v. *United States*, 355 F.2d 183 (9th Cir. 1965); 2, *Weinstein's Evidence* 503-506 (1982). Here, of course, Krotzer's communications with Worth referred to a matter of vital interest to both Krotzer and petitioner, and the district court found that Worth thereafter "acted as if he were representing the interests of both Jones and Krotzer" (Pet. App. A6).

Cir. 1978); *United States* v. *Kitchin*, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S. 843 (1979). See also *Ross* v. *Heyne*, 638 F.2d 979, 982-984 (7th Cir. 1979).[8]

b. Even were the district court incorrect in its conclusion that the attorney-client privilege covered Krotzer's prior communications with Worth, disqualification would nevertheless be appropriate. Worth owes an ethical obligation of loyalty to Krotzer, and may not use information acquired during the course of his prior representation of Krotzer either to Krotzer's disadvantage or to the advantage of petitioner. Model Code of Professional Responsibility DR4-101 (1980) (an attorney shall not use information gained in a professional relationship "for the advantage of himself or of a third person, unless the client consents after full disclosure"); Rule 1.6, ABA Model Rules of Professional Conduct Rule 1.6 (1983) ("[a] lawyer shall not reveal information relating to representation of a client unless the

---

[8]Petitioner argues (Pet. 13) that the district court erred in finding that Krotzer's interview with Worth involved confidential communications, because petitioner and Krotzer testified that Krotzer did not reveal anything "confidential" to Worth. Aside from the fact that this assertion ignores Krotzer's testimony that he did reveal his knowledge regarding at least one stolen vehicle to Worth and thereafter agreed with petitioner's rendition of the facts underlying the state charges (Pet. App. A22), the district court is not bound to agree with petitioner's characterization of the legal nature of the communications between Krotzer and Worth.

Petitioner's related assertion (Pet. 15) that "Krotzer testified that there were no disclosures made by Krotzer which could be utilized by Worth to help Worth cross-examine Krotzer if Krotzer is actually called as a witness at [petitioner's trial]" is equally unavailing. Krotzer, a layman, was unlikely to realize that he could be effectively cross-examined on the basis of his prior inconsistent position regarding the facts underlying petitioner's alleged crimes. Moreover, Krotzer never made the statement attributed to him by petitioner. The testimony to which petitioner apparently refers (Pet. 15) consists of Krotzer's simple acquiescence to counsel's leading questions (see Pet. App. A31-A32).

client consents after consultation"). Worth could undoubtedly use information obtained during the course of his prior representation of Krotzer to petitioner's advantage,[9] but petitioner has never suggested that Krotzer has consented or would consent to such conduct by Worth.[10] Disqualification of Worth, therefore, was an appropriate exercise of the district court's supervisory authority over members of the bar to enforce the ethical standards governing the practice of law. See Fed. R. Crim. P. 44(c) advisory committee note, 77 F.R.D. 507, 603 (1978).

3. Petitioner mistakenly asserts (Pet. 7) that his case will be affected by this Court's decision in *Flanagan* v. *United States, supra*. Although that decision would, of course, dispose of this petition should the Court agree with the

---

[9] For example, a possible course of Worth's cross-examination of Krotzer might be:

Worth:	Isn't is true that you indicated exactly the opposite to me in September 1982?
Krotzer:	Mr. Jones told you otherwise but . . .
Worth:	And you agreed with him, did you not?
Krotzer:	Yes, but . . .
Worth:	Just answer the question yes or no, Mr. Krotzer.

[10] Even were Krotzer to consent to be cross-examined by Worth, disqualification might be appropriate because of the substantial likelihood that the attorney would be called by one side or the other as a witness. As the above footnote demonstrates, Worth's primary importance to petitioner's defense could well be that he witnessed Krotzer convey information inconsistent with his expected trial testimony. If that eventuality arises, Worth should be called as a defense witness. See *United States* v. *Nobles*, 422 U.S. 225, 250 (1975) (White, J., concurring) ("[a] member of a defense team who witnesses an out-of-court statement of someone who later testifies at trial in a contradictory fashion becomes at that moment a witness to a relevant and admissible event"). The role of a witness is inconsistent with that of an attorney. See Model Code of Professional Conduct DR5-101, 5-102 (1980).

government's jurisdictional arguments, any decision on the merits in *Flanagan* would be unlikely to validate petitioner's position in this case.

Flanagan presents the question whether the district court properly disqualified defense counsel from jointly representing multiple defendants despite their purported waiver of their right to independent counsel. This case does not present similar considerations. There is no waiver issue in this case,[11] and the conflict found by the district court does not result from joint representation but rather from Worth's successive representation of Krotzer and petitioner. Moreover, a successive representation case, far from presenting a situation where "the potential conflict is even less apparent" than in a joint representation case (Pet. 10), generally involves a factual background where any potential conflict is readily spotted and analyzed. In this case, for example, the general outlines of Worth's prior representation of Krotzer are known and the conflicting professional

---

[11] Petitioner errs in complaining (Pet. 11 n.2, 15) that the district judge refused to permit his counsel "to explore" the question of whether he was prepared to waive his right to conflict-free representation. The district court prevented petitioner from answering Worth's question whether petitioner knew "of any conflict of interest that would exist to your detriment if the Court were to see fit to not disqualify me as your defense counsel" (Pet. App. A36). The inquiry was not allowed because the question sought a legal conclusion without any factual foundation. As the district court explained to counsel at the time, "If you want to reach that point, you'll have to lay a foundation. I don't know what education this witness has. I don't know if he is able to answer this question" (*ibid.*). Therefore, any blame for the state of the record on the waiver issue lies with counsel — not the district court. Petitioner has not been disabled from arguing waiver by the district court, but rather by counsel's failure to develop a factual background upon which to base a waiver argument. Petitioner, in any event, has not indicated any desire to waive his rights in this regard, and petitioner's waiver, standing alone, would not alleviate the conflict in this case. See text at page 10, *infra*.

responsibilities that are accordingly imposed on Worth are quite apparent. See, *e.g.*, Model Rules of Professional Conduct Rule 1.7 (1983) (lawyer shall not undertake successive representation adverse to the interests of a prior client unless "each client consents after consultation").

The attorney-client conflict in this case, finally, cannot be resolved by petitioner alone: in *Flanagan*, assuming contrary to our arguments there that the defendants' waiver of their right to conflict-free counsel must be accepted regardless of the costs that the waiver imposes on the criminal justice system, a valid waiver disposes of the asserted conflict. In a successive representation case, however, the defendant's willingness to waive his right to independent counsel cannot destroy the correlative rights of the other client. Petitioner, in short, cannot waive Krotzer's right not to be cross-examined regarding matters arising out of a confidential attorney-client relationship. This Court's disposition of *Flanagan*, therefore, promises little aid to petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MARGARET I. MILLER
Attorney

FEBRUARY 1984

DOJ-1984-02